contrary they amount to an admission of the amount claimed.

Reference was also made by Al Rashid Mohd. Ibrahim to what was called a memorandum of agreement dated March 15, 1980 which he says terminated all previous agreements between the parties. If that were so then the invocation by the defendants of clauses XIII and XIV of the agreement of July 1, 1978 cannot be permitted! The defendants are blowing hot and cold.

In my judgment what we have is a mere refusal to pay upon a claim which had been admitted as being owing to the plaintiffs. There is nothing to be settled by arbitration. On a true construction of clause XIV only claims which are *bona fide* disputes or are *bona fide* controversies, that call for settlement by arbitration. Where a claim is admitted it does not call for a settlement by arbitration. All that is called for is for payment of the admitted amount which can be by an action in the Courts as has been done in the instant case.

As to clause XIII, that the parties had agreed that Singapore law would govern the reading of the agreement does not oust the jurisdiction of the Malaysian Courts to try an action arising out of the agreement. See *The Fehmarn*[2] where even when the agreement provided that disputes arising therefore should be tried in tribunals of a foreign country the English Courts had held that that did not oust the English Courts jurisdiction to try the disputes.

I held that the defendants' application enclosure[7] failed on both counts. It was dismissed with costs.

Application dismissed.

Solicitors : *Jagjit Singh & Co.; Ng Ek Teong & Partners.*

PANG TEN FATT & ANOR. v. TAWAU TRANSPORT CO. SDN. BHD. & ORS.

[O.C.J. (Wan Mohamed J.) January 14, 1985]

[Tawau – Civil Suit No. T 127 of 1981]

Company Law – Private company – Rights given to founder members under articles of the company – Amendment of relevant articles depriving them of those privileges and rights – Amendment null and void – Articles providing for vacation of office of director absenting himself from three consecutive meetings of the Board – Director validly disqualified under the articles – Companies Act, 1965, s. 31.

In this case the proprietors and Managers of three bus Companies in Tawau formed a private company known as Tawau Transport Co. Sdn. Bhd. Certain rights and privileges were given to founder members under articles 11 and 71 of the company's articles. Plaintiffs together with two other persons were named permanent directors having an allowance of $200 per month. Plaintiff No. 1 was appointed secretary of the company on a salary of $1,900 per month while plaintiff No. 2 was appointed station master on a monthly salary of $1,050. The services of the plaintiffs were terminated by giving 3 months' notice on their reaching the age of 55 years.

The Articles of Association of the company also provided for vacation of office of a director if he absented himself from three consecutive meetings of the Board. Both the plaintiffs also ceased to be directors as they failed to attend three consecutive meetings of the Board.

The plaintiffs filed a suit against the company and other directors claiming that their dismissal as secretary and station master respectively was null and void. They also prayed for reinstatement as director and for a declaration that the proposed amendments to articles 11 and 71 were wrongful.

Held: (1) the plaintiffs have ceased to be directors of the Company in accordance with the articles of the company as they failed to attend three consecutive meetings of the Board;

(2) plaintiffs were founder members of the company and they held their respective posts by agreement and arrangement at the time of formation of the company. They are not to be treated as ordinary workers or employees of the company. Notice terminating their services are null and void;

(3) the amendments to articles 11 and 71 are null and void as they infringe the rights and privileges given to some individuals on the formation of the company.

CIVIL SUIT.

Joseph Lee for the plaintiffs.
Edward Tsen for the defendants.

Cur. Adv. Vult.

Wan Mohamed J.: Both the plaintiffs in this

case are two of the five founder members of the 1st defendant company which was formed or amalgamated in 1966 – the proprietors and managers of three bus companies in Tawau, *viz.*, The Tawau Bus Company, Apas Transport Company and Sin On Road Bus Company, got together and formed the 1st defendant company known as the Tawau Transport Company Sendirian Berhad. By arrangement and agreement at the time of the formation of the 1st defendant company, plaintiff No. 1 who was the manager of the Sin On Road Bus Company and plaintiff No. 2 who was the proprietor of the same bus company were made Directors of the company. The rights and privileges of founder members are provided in Article 11 of the Articles of Association as in exhibit "AB-2". Article 71 provides for permanent directors. Also by arrangement and agreement at the time of the amalgamation of the 1st defendant company, plaintiff No. 1 was given the post of the Secretary of the company, while plaintiff No. 2 was given the post of a Station Manager. Plaintiff No. 1 and plaintiff No. 2 were paid Director's Allowance of $200 per month each. In addition to this plaintiff No. 1, being the Secretary of the company, was paid a monthly salary of $1,900, while plaintiff No. 2 being a Station Manager, was paid a monthly salary of $1,050. Together with other founder members they served as Directors and worked in the 1st defendant company until both the plaintiffs and a few others were given 3 months' notice that their services were terminated on reaching the age of 55 years. The notice were issued by defendant No. 2, the manager of the 1st defendant company. The plaintiffs were dissatisfied with the termination of their services and filed this civil action against the 1st defendant company and the Directors.

The plaintiffs claim:

(a) a declaration that the dismissals of the 1st and 2nd plaintiffs as executive directors of the company are null and void;

(b) an order that the 1st and 2nd plaintiffs be reinstated as executive directors as from September 15, 1980, and that the executive directors' fees due to them be paid as from that date;

(c) damages for wrongful dismissal;

(d) a declaration that the proposed amendments of Articles 11 and 71 are wrongful;

(e) an injunction to restrain all the defendants from proceeding to amend Articles 11 and 71;

(f) any other just reliefs.

The defendants in their defence deny that both the plaintiffs were executive directors and deny that the plaintiffs were ever given notice by any of the defendants to terminate their services as directors of the 1st defendants company. The defendants aver that both the plaintiffs ceased to be directors of the company, as they failed to attend three consecutive meetings of the Board of Directors. The defendants further aver that the amendments to Articles 11 and 71 were made in accordance with section 31 of the Companies Act and for the benefit of the company as a whole; and the right to do so is provided in clause 5 of the Memorandum of Association.

After hearing the evidence of both the plaintiffs and the defendants and going through the written submissions of counsel on both sides, I find the case as follows.

The 2nd defendant has in fact issued three months notices to plaintiff No. 1 and plaintiff No. 2 as in exhibit "AB-1" and exhibit "AB-8" terminating their services as Secretary of the company and as a Station Master respectively on reaching the age of 55 years. The notice reads:-

"June 17, 1980

Mr. Pang Ten Fatt
Tawau Transport Co. Sdn. Bhd.,
Tawau.

Dear Sir,

The Management wishes to inform you that any employee of the company who has attained the age of 55 years is entitled to retire, and we hereby give you three months notice to terminate your service with us.

We will arrange to pay you your Provident Fund before you leave our company.

We also take this opportunity to thank you for the devoted service that you have rendered to the company during your employment.

Yours faithfully,

(sgd)
Manager
TAWAU TRANSPORT COMPANY SENDIRIAN BERHAD"

Similar notice was given to plaintiff No. 2. It is clear for all intent and purposes that plaintiff No. 1 and plaintiff No. 2 were given notices only to stop working in the 1st defendant company, *i.e.*, plaintiff No. 1 was to stop working as the Secretary of the company and plaintiff No. 2 was to stop working as the Station Master. They were not discharged of their position as directors of the company.

This finding is supported by the facts that they were continued to be paid their allowances as directors of the company until they vacated their directorships under Article 75(d) of the Articles of Association. Article 75(d) reads:

"If he absents himself from three consecutive meetings of the Directors or from all meetings of the Directors for a continuous period of three months whichever is the longer without special leave of absence from the Directors."

I find it as a fact that plaintiff No. 1 and plaintiff No. 2 had failed to attend four consecutive meetings of the Board of Directors without special leave of absence from the Directors; and it was recorded at the Fourth Meeting held on December 27, 1980 – exhibit "AB-11(d), para. 6" under the heading "AGENDA" which reads:-

"Both Mr. Pang Ten Fatt and Mr. Shim On have been absent from four (4) consecutive meetings of the company and for more than three months. Under Article 75(d) of the Articles of Association of the company, their offices as Directors are now vacated. An agenda shall be included in the Annual General Meeting to appoint two (2) Directors to replace them."

The three previous consecutive meetings of the Board of Directors referred to above were meetings held on September 20, 1980, October 4, 1980, and October 11, 1980.

Going back to the three months' notices issued by the defendant No. 2 which purported to terminate the services of plaintiff No. 1 as Secretary and plaintiff No. 2 as Station Master on reaching the age 55 years, I find that such notices were null and void for the following reasons:-

(a) plaintiffs were founder members of the 1st defendant company. They held their respective posts by agreement and arrangement of all the founder members of the company at the time of its formation or amalgamation. Therefore, they are not to be treated as ordinary workers or employees of the company;

(b) there is no law which provides that a worker can be compulsorily terminated of his service in any employment on reaching the age of 55 years. An employee can be legally terminated from service at the age of 55 or even earlier if it is provided in the conditions of service;

(c) defendant No. 2 as manager of the 1st defendant company has no power to terminate the services of both the plaintiffs as the former was not the appointing authority;

(d) the resolution of the Board of Directors at the meeting held on September 20, 1980 purported to remove the plaintiff as Secretary of company as in exhibit "AB-11 (a)" which reads:

"AGENDA II

To discuss Mr. Pang Ten Fatt of his retire, left our company and also to revoke his power of signing cheques on behalf of this company with effect from today and which was read and unanimously passed."

is not only vague and incomprehensible but based on no reasonable or true grounds. The truth was that plaintiff No. 1 was given notice terminating his service by the manager of the company (defendant No. 2) as stated earlier. Yet defendant No. 6 as Chairman of the Board of Directors gave a different version as to the reason why plaintiff No. 1 was dismissed. This is found in his letter to the solicitor for the plaintiff and the relevant part of that letter reads:

"The position of Mr. Pang Ten Fatt as Secretary of the company has been dismissed by the Directors Meeting on September 20, 1980, as he failed to fulfil his duty as Secretary of the company."

It is most improper for a company or an employer to dismiss a staff or a worker on a mere allegation or assumption that the worker has failed to fulfil his duty. In fact there was no allegation anywhere that plaintiff No. 1 had failed to fulfil the duty as secretary, but on contrary there were words of appreciation and praise by the manager of the company in exhibit "AB-1" which reads:

"We also take this opportunity to thank you for the devoted service that you have rendered to the company during your employment."

All the above facts go on to show that the defendants had acted wrongfully in trying to get rid of both the plaintiffs for reasons best known to themselves.

The next important point to consider in this claim is whether the amendments made in respect of Articles 11 and 71 were proper in the circumstances of the matter and in the light of the evidence adduced before me in this case.

Article 11 provides for the number, rights and privileges of founder members of the company. These rights and privileges are something given by the company to someone and they are absolute. They cannot be taken away without the consent of all the persons who are beneficiaries of those rights and privileges. In this case I find that those rights

and privileges cannot be modified to the disadvantages of all the founder members.

Section 31 of the Companies Act provides the manner and circumstances under which articles of association can be amended, but it cannot withdraw the rights and privileges given by the company to anyone who is a shareholder or an outsider.

Clause 5 of the Memorandum of Association deals with shares. It reads as follows:

"The share capital of the company is MR 3,000,000 (Three Million Malaysian Ringgit) divided into 30,000 shares (Thirty thousand) ordinary shares of MR 100 (One Hundred Malaysia Ringgit) each with power to increase or reduce the capital to consolidate or subdivide the share into shares of larger or smaller amounts and to issue all or any part of the original or any additional capital with any special or preferential rights or privileges or subject to any special condition and either with or without any special designation and also from time to time alter, modify, commute, abrogate or deal with any such rights, privileges, terms, conditions and designation as provided by the Articles of Association of the company."

The power to alter, modify, *etc.*, given in the above clause refers only to the shares which would be issued after the formation or amalgamation of the company and not in respect of the rights and privileges already enshrined in the Articles of Association. The amendment made on August 21, 1967, to Article 11 is valid because it was done with the consent of all the founder members, but not in the case of the amendment made on May 9, 1981, as shown in exhibit "AB-13" because it was objected to by plaintiff No. 1. The law of majority does not apply in this matter for reasons stated earlier.

Similar argument applies in respect of the amendments to Article 71. I therefore hold that the amendments to Articles 11 and 71 are null and void.

My findings and order as already recorded in the notes of proceedings are as follows:

Findings

(1) The notices terminating the services of the two plaintiffs as employees of the 1st defendant company are null and void.

(2) The two plaintiffs were not given notices to terminate their services as the Directors of the company.

(3) The two plaintiffs were legally disqualified as Directors under Article 75 for not attending four consecutive meetings of Board of Directors.

(4) The amendments to Articles 11 and 71 are null and void as they infringed the rights and privileges given to some individuals on the formation of the company.

ORDER

(1) Defendants to pay the salaries of the two plaintiffs from the time they were purported to be terminated to date of judgment with 8% p.a. interest from date of judgment to date of payment.

(2) Plaintiffs are continued to be employed by defendant No. 1 on the same terms until properly and legally terminated but they shall not be reinstated as Directors of the company.

(3) Plaintiffs are entitled to all the rights and privileges under the original provision of Article 11 of the Articles of Association of the 1st defendant company. The amendments to Articles 11 and 71 made on May 9, 1981, are null and void.

(4) Defendant to pay costs to be taxed.

Order accordingly.

Solicitors : *Joseph Lee & Co.; Chu Thien Co.*

MUSTAPHA BIN MOHAMED NOH v. OSMAN BIN SHAHIDAN & ANOR.

[O.C.J. (Mohamed Dzaiddin J.) January 10 & 28, 1985]

[Penang – Civil Suit No. 76 of 1981]

Contract – Contract for sale of land – Land in the name of the deceased of whom vendors were the only heirs – Agreement providing for return of advance paid in the event of vendors failing to complete the purchase – Vendors cannot repudiate contract by returning the advance – Specific performance.

In this case the land was registered in the name of Che Rosiah bte Awang, deceased. The daughter and son, who were the only heirs of the deceased, agreed to sell the land to the plaintiff for $8,000. An agreement was drawn up and the plaintiff paid $2,000 advance towards the purchase consideration. Clause 8 of the argument provided for the return of the advance if the vendors failed to complete the